

The Big Lie: Federal ownership of public lands

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By Hari Heath

With a series of unconstitutional takings, beginning almost a century ago, the federal government now claims to own almost two-thirds of Idaho. Most of that "ownership" is claimed as lands "administered" by the Forest Service.

This is one of the lies that, having been told often enough, is now believed to be true. We want to believe in the sanctity of our national parks, wilderness areas and forest lands. They are a wonderful public resource. However, the truth is, the federal government is constitutionally prohibited from owning this type of property within a state.

Political power often leads to corruption, and in Idaho, like everywhere else, the federal government has become the very definition of corruption. Just like the native peoples, whose treaties with the federal government have been broken, much of Idaho's public lands have been stolen by the Great White Father in Washington, D.C.

Any comparison between constitutionally formed government and the usurpers in the administrative regimes which now rule us becomes a study in deceit and deception. Pick any subject that is "governed" and look into the legitimate constitutional authority and limitations to govern that subject. Compare these constitutional facts of life with how government is operated today.

This is also a wonderful study in how the Hegelian opportunists in the administrative realms find or manufacture a problem, proclaim themselves to be the solution, and secure a job for life at public expense. Once a small problem is discovered and they have secured their position as the solution, these opportunists become well positioned to multiply the problems they claim to be solving, until an unfathomable depth of bureaucracy is formed. Today's Forest Service provides just such an example.

In the words of Gifford Pinchot, who championed his cause and became the first chief of the Forest Service, "the fundamental idea of forestry is the perpetuation of forests by use." He said the federal forest reserves were needed, "rather to help the small man making a living than to help the big man to make a profit."

What began as a solution to the fraudulent schemes of the timber barons of a century ago now prevents many a small man from making a living, while disease and insects devour accessible timber. No longer helping the small man, the forest service now requires a "permit" to travel on many "wild" rivers and wilderness areas, or to park a vehicle near a cross country ski trail. By administrative edict, they have recently made it a crime for the public to drive on a majority of the forest road system.

Through a “test program” called the “Recreation Fee Demonstration Project” they are applying the thin edge of the wedge to turn public lands into a private business for bureaucrats. “Four federal public land agencies have been empowered to test various ways to provide increased benefits to visitors of public lands through recreation-use fees,” says the Forest Service brochure, “Our National Forests.”

Whose national forests? How have we become subjected to these convoluted schemes? Or more importantly, does the federal government have any business administering public lands within a state? Let's look at the facts and the history behind the BIG Lie.

The constitutional facts of life

The founders of America drafted the United States Constitution to form a limited federal government. It was designed to take care of only those things which were truly our national business. The state governments or the people were to keep all other powers. Article One, Section 8, Clause 17, offers the only provision in the Federal Constitution for federal ownership of land. It provides for the creation of Washington, D.C. as the seat of the federal government and allows the federal government to purchase lands in a state with “...the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.”

This is the only kind of property that the federal government is empowered to own in a state. The federal government cannot own forest lands. Why? Because no such power has ever been delegated to it and the Tenth Amendment prohibits the federal government from assuming any power which has not been delegated to it by the Constitution: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” This is the first constitutional fact of life preventing federal public land ownership within a state.

The state of Idaho began as the Idaho Territory. This federal territory was acquired by a treaty with Great Britain, popularly known as the Oregon Treaty and from treaties with the Indian tribes. Most of Idaho was to become Indian reservations until gold and other valuable interests were discovered. Then the federal government wouldn't keep its word with the Indians. This caused wars when the federal government imposed new treaties taking away more native lands. However right or wrong the treatment of the Indians and their treaties were, the Idaho Territory was formed and became a federally-held property.

In 1890, Idaho was admitted as a state in the union and its government was formed by the state Constitution. Article Ten, Section 4, of the Idaho Constitution says “All property and institutions of the territory, shall, upon the adoption of the Constitution, become the property and institutions of the state of Idaho.”

This second constitutional fact of life conveyed the territorially held lands to the new state.

“The people,” at least the 64 people who signed the Idaho Constitution, gave up their interest in the public lands in Article Twenty-one, Section 19, of the Idaho Constitution. That section states

in part: "And the people of the state of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof ... and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States..."

This is the third constitutional fact of life.

Those 64 people, acting as a constitutional convention for Idaho, essentially quit claimed "the people's" interest in the public lands. It is important to remember that the Idaho Constitution was signed at the convention in August of 1889. Idaho was still a federal territory then. The title to the unappropriated lands remained with the federal government until Idaho became a state the following year.

Many things happened when Congress passed the Idaho Admission Act in 1890. Idaho was admitted into the union as a state on an equal footing basis with the other states. Congress also "accepted, ratified and confirmed" the Idaho Constitution in the Idaho Admission Act. Some public lands were specifically appropriated in the Admission Act, as state endowment lands for schools and other state purposes.

The other remaining public lands were not specifically granted to the state for particular purposes.

As a state, Idaho's relationship with the federal government also changed. Once Idaho was no longer a federally-held territory, the Federal Constitution imposed new limitations on the federal government. They were now prohibited from owning anything except "other needful buildings" and certain military property in the new state, initiating the first constitutional fact of life.

When Congress accepted, ratified and confirmed the Idaho Constitution, they both conveyed any unappropriated lands held as property of the Idaho Territory to the new state of Idaho and released any interest "the people" may have had in those lands to the state, giving the state clear title to the unappropriated lands. This "extinguished" the United States title to those lands since the federal government was now prohibited from owning them and "forever disclaimed" the people's interest in the unappropriated public lands, bringing the second and third constitutional facts of life into force and effect.

The beginnings of the Big Lie

So how did we get federal forest lands in Idaho? Constitutionally, after obtaining the consent of Idaho's legislature, the federal government can own a fort or a building, but not public forest lands. Did those in the seat of federal power pay attention to the truth and abide by the limitations imposed by the Constitution which gave them the power in the first place? Even though statehood was achieved, the federal government continued to treat Idaho as if were still a federal territory.

Just as they did to the Indians, the federal government would eventually take back much of the lands which became state property. Using both the hammer of the law and a seemingly benevolent administration, the Big Lie was forged.

Idaho became a state during the industrial revolution. While the wheels of industry were rolling in the east, Idaho was still a relative frontier, with largely untapped natural resources. Timber and minerals were the main items of industrial interest. Many industrialists were already capitalizing on the new state's abundance.

As is often the case when greed is a prime motivator, many of those involved engaged in less than honorable conduct. A great land grab was underway. Beginning in the Great Lakes region, timber Barons and speculators had spread their schemes to the Northwest.

Taking advantage of federal programs to sell land to settlers and homesteaders, the unsavory schemers would use dummy settlers to file false claims or they would "sponsor" settlers who would sell the lands back to them soon after they were acquired from the government.

The Timber and Stone Act of 1878 permitted individuals to buy up to 160 acres of timber or stone at \$2.50 an acre provided the land was solely for their own use and they had made no prior agreement to convey the title to another person. These near give-away programs, intended to benefit the common man, ended up benefitting the industrialists who picked up properties at a fraction of their value.

The "solution" to the "problem" had a two-pronged approach. Prosecutions for land fraud began while a federal scheme to "reserve" and "administer" these lands and their resources emerged. Good intentions have paved many a dark highway.

Timber fraud in high places

Oregon was one of the first places where prosecutions for timber fraud were initiated. An Oregon land ring had been gobbling up public land in Oregon and California. Former Oregon congressman Binger Hermann, was then head of the General Land Office, which sold lands to settlers. Agents discovered a major scandal that led to his resignation.

He was indicted for burning his files but was never convicted. Oregon's senior senator John Mitchell was convicted for taking a bribe. Eventually, a congressman, a U. S. Attorney, a U. S. Commissioner and three state senators were caught in the scam. Oregon's other U. S. Senator Charles Fulton was also suspected of being involved in the land frauds.

In 1907, evidence emerged that created much suspicion of similar land frauds in Idaho. The Barber Lumber Company of Wisconsin had obtained 40,000 acres of timberlands in the Boise Basin through fraudulent schemes that involved well-connected Idaho political figures.

Among those suspected was Idaho's Senator William Borah, who had been the attorney for the Barber Lumber Company. Borah and ten others were eventually indicted. This all occurred during very "interesting times" in Idaho history. Borah was under indictment for the land frauds

while he was also appointed as a special prosecutor for the murder case against the miners who allegedly had blown up and killed Idaho's Governor after the mining wars in the Silver Valley.

The unrest from the mining confrontations was still a hot issue as Pinchot and Roosevelt doubled the size of the National Forests, many of them in Idaho.

Good Intentions and the Great Theft

The timber resources of the country were being cut at a rate that alarmed many people. "America had but twenty years of timber left," said Gifford Pinchot. Pinchot said Theodore Roosevelt's timber policy was to provide "the greatest possible good to the greatest possible number."

Such was the cry of the eastern socialist offering his "solution." As an aristocrat with a passion for public service, Pinchot was the architect of Roosevelt's conservation policy and the force behind its implementation.

Pinchot was educated in Europe and later at three of America's best private schools. At Yale, he was inducted into Skull and Bones, the college's most prestigious secret society. Yale offered no forestry courses and the profession didn't exist in the United States, so he enrolled in the French Forest School at Nancy. There he learned that "forestry is the art of using a forest without destroying it."

He returned in 1890 to an America that was obsessed by a "fury of development." He wrote that America "was fiercely intent on appropriating and exploiting the riches of the richest of all continents -- grasping with both hands, reaping what he had not sown, wasting what he thought would last forever."

Beginning with almost a billion acres of forests when the first Europeans arrived, the government had already given away much of the public lands. Over 150 million acres went to encourage railroad construction; 4.5 million to promote canal building; 3.5 million to build wagon roads; 2.25 million as an incentive for river improvement. Almost 100 million acres had gone to settlers under the Homestead Act and millions more under the Timber and Stone Act.

By 1900, roughly half of those billion acres had been cut and four-fifths of the remaining timberlands were in private hands.

There was a genuine problem of industrial exploitation. Over zealous harvesting to feed the wheels of growth and expansion left a legacy and a scar upon America's forests. Pinchot had many sound forest management ideas, which he had demonstrated as the forester for the 3,500-acre woodland on George Vanderbilt's Biltmore Estate. Among his beliefs was "the fundamental idea that forestry is the perpetuation of forests by use."

Pinchot's work at the Biltmore Estate led to his design of a forestry course at Columbia University and a contract to study the New Jersey forests. He also became involved in New York politics, campaigning with the Citizens Union for Social Reforms.

The beginnings of our national forests

In 1876 Franklin B. Hough was appointed as the first national forestry agent under the Department of Agriculture. Hough reported to Congress on the condition of American forests. By 1881 a Division of Forestry was established where Hough continued the study of America's timber. In 1886 the Division of Forestry was given formal recognition with Dr. Bernhard Fernow at the helm.

On March 3, 1891, the Forest Reserve Act authorized the creation of "forest reserves." In 1896 the National Academy of Sciences appointed a seven-man National Forest Commission. Presidents Harrison and Cleveland had already proclaimed almost 20 million acres as forest reserves but there was no plan or rules to govern their use.

Charles Sargent chaired the commission and Pinchot became it's secretary. 1897 began the management of the forest reserves under the Organic Act.

In July 1898, Gifford Pinchot replaced Fernow as the forester at the Division of Forestry which had grown to 60 employees.

As President Cleveland was about to leave office he issued proclamations creating 13 new forest reserves, stirring outrage and protest in the west. During the McKinley administration Pinchot was appointed to chief forester and traveled throughout the west to appease the fears of westerners and spread his views of enlightened forest policy.

Enlightened as it may have been, there was no constitutional basis for this federal policy. Pinchot also consulted with the then New York Governor Theodore Roosevelt on the future of the state's forests. This began a relationship which developed further when Roosevelt became president.

Pinchot became very influential with President Roosevelt and drafted the forestry section of his first state of the union address in 1901. The Roosevelt-Pinchot forest policy was formulated as "the fundamental idea of forestry is the perpetuation of forests by use" and "the forest reserves should be enlarged and set apart forever, for the use and benefit of our people as a whole, and not sacrificed to the shortsighted greed of a few."

Pinchot began to dedicate himself to a problem. The Interior Department controlled the forest reserves, but had no foresters, while the Bureau of Forestry in the Agriculture Department had foresters, but no forests. A bill calling for such a transfer was defeated in Congress in 1902, so Pinchot conceived the American Forest Congress, a consortium of various special interests.

He later admitted that it was "planned, organized and conducted" by his bureau to transfer power and forests to his agency.

In 1905 the Transfer Act passed into law, converting the Bureau of Forestry into the Forest Service and the forest reserves into national forests administered by the new Forest Service. Foresters and 86 million acres of national forests were combined in the new agency with Pinchot at the helm.

The new federal timber barons: Theft by proclamation

Pinchot became a target of western politicians who accused him of “Pinchotism.” One Colorado legislator said this enormous territory of forest reserves is an empire within a republic, ruled by a despot with as much power as the Czar of Russia.”

The Roosevelt-Pinchot forest program met fierce opposition in Idaho. 20,336,000 of Idaho's 53,945,000 acres had been designated as 17 national forests by 1907. Pinchot's plan was taken as a grievous affront to state sovereignty. Oregon's Senator Fulton introduced an amendment to the 1907 Agricultural Appropriations Bill which would deprive the president of any authority to create more national forests in many of the western states.

The bill passed and needed the president's signature by March 4 to become law. Without his signature, the Agriculture Department and the Forest Service would have no funds to operate. Roosevelt and Pinchot responded by preparing and issuing 32 more proclamations creating and expanding national forests by March 2. These doubled the area of the Forest Service to approximately 150 million acres.

The president then signed the Agriculture Bill which funded the Forest Service and ended, at least temporarily, the presidential power to proclaim new national forests.

The forest reserves were created by issuing “Presidential Proclamations.” These executive edicts were not legislated or approved by the Congress. The Legislature of Idaho gave no consent for the federal government to purchase these forest lands and federal government did not actually purchase these “forest reserves.” The Forest Service only “administers” the forest reserves. This pretended ownership by administration continues to this day.

Have it both ways?

On the one hand, the federal government only claims to “administer” these lands, not own them, until, on the other hand, they want to prosecute people “criminally” for violating Forest Service regulations. As a matter of established law, “federal criminal jurisdiction” only exists on property owned by the federal government when the state has ceded its jurisdiction to the federal government, as the following courts have ruled:

”A state retains complete and exclusive political jurisdiction over land purchased by the United States without the consent of the state or where political jurisdiction has not been otherwise ceded to the United States by the state.” (US v. San Francisco Bridge Co., D.C.Cal. 1898, 88 F. 891).

”When United States acquires property by purchase, consent of state must be secured before United States has complete jurisdiction over property.” (Hayes v. US, C.A.Kan. 1966, 367 F.2d 216).

"Constitution prescribes the only mode by which the United States can acquire land as a sovereign power, and, therefore, they hold only as an individual when they obtain it in any other manner." (US v. Penn, C.C.Va. 1880, 48 F. 669).

"When land or other property is acquired by United States by purchase or condemnation without consent of state legislature, it would not be entitled to exercise exclusive jurisdiction over property, as state has retained right to exercise its general police powers." (McEachin v. US, D.C.App. 1981, 432 A.2d 1212).

Those who have been unfortunate enough to receive a citation for violating some federal forest regulation will find the federal government claims an authority to prosecute them under the "Property Clause" of the federal Constitution (Article Four, Section 3, Clause 2). The federal government must own the property to invoke the Property Clause, but when a defendant tries to challenge the federal court's criminal jurisdiction by demanding proof of federal ownership of the property and cession of jurisdiction by the state, the federal prosecutor cannot prove either.

This, however, does not stop the prosecution of the defendant, as my own experience has shown.

The Big Lie of the federal ownership of forest lands within a state must be protected. Anyone who attempts to challenge federal criminal jurisdiction based on the constitutionally impossible nature of federal forest land ownership will find out what power is all about. Federal prosecutors will hide the constitutional facts of life while federal judges ignore them. Truth and justice will be buried to protect the Big Lie. Absolute power corrupts absolutely. Federal forest lands exist because the federal powers that be maintain their control by preventing the exposure of the constitutional facts of life. The truth is there cannot be any National Forest lands in Idaho. Truth was one of the casualties in the so-called Civil War. That war was more about states' rights than slavery, and the federal government has treated the states as mere territories ever since.

Imagine a solution

No, I am not a hegelian opportunist seeking a job for life as the administrator of yet another "solution," but imagine, for a moment, some possibilities. If the constitutional facts of life were to be recognized we could begin an orderly transfer of the federally held lands back to the state. By also recognizing the other constitutional facts of life that limit the size and scope of state government we could shrink down state government to an honest size. Once state government became affordable again we could eliminate property taxes. And maybe the sales tax. Perhaps even income taxes. How? By the proceeds from the vast resources which properly belong to Idaho.

Two and a half million acres of state endowment lands fund much of our state schools. The over 34 million acres of the now federally-held public lands might also fund the rest of the state and county governments. Instead of property taxes, a portion of the proceeds from timber, minerals, grazing, recreation and other fruits of the land could go into a general fund which could be returned in part to the counties on a per capita basis. Another portion could fund our state government. Right now the Forest Service pays 25 percent of the stumpage from timber sales to

the counties as payment in lieu of taxes. What kind of prosperity would result if all of the stumpage went to an Idaho Public Lands Fund instead?

Many Idahoans are frustrated by the dysfunctional mandates of current Forest Service management policies. The Forest Service is congressionally constipated with contradictory mandates which have given the agency's holdings the less than affectionate title, "the land of no use." The original battle cry of the Roosevelt-Pinchot forest policy was "the fundamental idea of forestry is the perpetuation of forests by use." Why not adopt such a policy under state management? This wouldn't mean an end to our valued wilderness areas. Under an orderly transfer of ownership, the remote and pristine wonders of our state's natural heritage could become state wilderness areas. The state could adopt wilderness policies promoting recreational use and management by nature, while allowing scientific, common sense, active management of the more accessible and productive public resource areas.

Through the inaction of the current Forest Service, much of the already roaded public lands are being ravaged by disease and insect infestations. A tinderbox condition has developed from a century of fire suppression preventing nature's method of thinning the forest. In the absence of fire, failure to mechanically thin nature's abundance leaves our forests ripe for catastrophic fires, as forest diseases and insects generate the fuel.

Many private landowners and loggers who care about the forest have demonstrated what can be done by working with nature to "perpetuate the forests by use." Trees killed by insects and disease can be turned into valuable timber if they are harvested timely. Often this results in better forest health, while directing man's consumptive interests to the bounty of nature's gifts.

The state could develop a stewardship program where Idahoans could lease or otherwise contract for long term, low impact, resource management of these state public lands. More than just a timber sale, stewardship could involve developing an environmentally sound road system; protection of sensitive areas; wild life habitat enhancement; active management of the forest for long term productivity, as well as developing recreational opportunities for the public on each "steward's" project area. Our many skilled foresters could be employed, working with the resource stewards as they manage the public lands. This could finally achieve Gifford Pinchot's original idea for the forest reserves: "to help the small man making a living, rather than to help the big man to make a profit."

Time for Action?

Idaho has lost more than the 52,712 square miles of the Big Lie. How much has this great timber fraud taken from our state by the failure to "use the forest without destroying it." Mill closures have plagued the timber industry while disease and insects have a feast. Many of those in the business of making our natural resources productive have a dim future while our public lands are being closed to the public, and their potential is idled.

A few years ago the Idaho legislature passed a Tenth Amendment Resolution, declaring that the federal government must live within the bounds of the Constitution.

Was this just more fuzzy wuzzy, feel good legislation, or did our legislators mean it? Will our state officials act now to end the Big Lie? Can we begin an orderly transfer of what properly is state public land? It may take a state Constitutional Amendment to give the mandate for the management of these lands. The State Department of Lands would have to be expanded, or another agency created, to fulfill the new mandate, but government usually doesn't mind getting larger and attaching itself to another revenue stream.

Many Idahoans have the common sense, the science and generations of experience to intelligently manage our public resources. A working, real world multiple use mandate, using the stewardship model can be developed providing many benefits to the state and the people. Idahoans building a better Idaho from the ground up. If we demand action, and an end to the Big Lie, perhaps our state leaders will follow.
